UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

The Cayuga Nation, by its Council of Chiefs and Clan Mothers; Clan Mother PAMELA TALLCHIEF; Clan Mother BRENDA BENNETT; Sachem Chief SAMUEL GEORGE; Sachem Chief WILLIAM JACOBS; Representative AL GEORGE; Representative KARL HILL; Representative MARTIN LAY; Representative TYLER SENECA, Plaintiffs, vs. The Honorable RYAN ZINKE, in his official capacity as Secretary of the Interior, United States Department of the Interior; MICHAEL BLACK, in his official capacity as Acting Assistant Secretary – Indian Affairs and in his individual capacity; BRUCE MAYTUBBY, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs; WELDON "BRUCE" LOUDERMILK, in his official capacity as Director, Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, Defendants.	Civil Action No.: 17-cv-01923-CKK

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION OF "CAYUGA NATION COUNCIL" TO INTERVENE

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INTRODUCTION

In 2016 and 2017, Defendant agencies and officials issued decisions rejecting Plaintiffs' Indian Self Determination and Education Assistance Act ("ISDEAA") contract application and awarding the contract to a leadership faction of the Cayuga Nation known as the Halftown Group. On September 20, 2017, Plaintiffs filed this action, arguing that the decisions recognizing the Halftown Group for purposes of ISDEAA contracting impermissibly imposed a requirement that the Cayuga Nation use "plebiscites" to choose its leaders and violated rights protected by the Administrative Procedures Act ("APA"), federal law, and the Constitution. Plaintiffs' action seeks vacatur of the contracting decision and restoration of the *status quo ante*. The action does not seek disgorgement of the funds allocated pursuant to the contracting decision and does not ask that the United States make or be enjoined from making any further decisions regarding recognition of the Cayuga Nation or its government. In sum, this action seeks no relief affecting any legally protected interest of Movants, the Halftown Group.

On January 23, 2018, the Halftown Group, now calling itself the "Cayuga Nation Council," filed with this Court a Motion to Intervene. *See* Docket No. 17, Motion of the Cayuga Nation Council to Intervene ("Motion"). Plaintiffs oppose the motion; Defendants do not. *Id*. at 3. Pursuant to this Court's Minute Order of January 25, 2018, Plaintiffs file this Opposition to the Halftown Group's Motion to Intervene.

I. Legal Standard for Intervention

The D.C. Circuit "ha[s] identified four prerequisites to interven[tion] as of right [pursuant to Rule 24(a)]: '(1) the application to intervene must be timely[1]; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that

[1] Plaintiffs do not challenge the timeliness of the motion to intervene.

interest; and (4) no party to the action can be an adequate representative of the applicant's interests.'" *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). In addition, "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit," the applicant also must establish that she has standing to participate in the action. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (quoting *City of Cleveland v. NRC*, 17 F.3d 1515, 1517 (D.C. Cir. 1994)).

"Where a party seeks to intervene as a defendant in order to uphold or defend an agency action, it must establish: (a) that it would suffer a concrete injury-in-fact if the action were to be set aside, (b) that the injury would be fairly traceable to the setting aside of the agency action, and (c) that the alleged injury would be prevented if the agency action were to be upheld." *Forest County Potawatomi Community v. United States*, 317 F.R.D. 6, 11 (D.D.C. 2016); *see also Deutsche Bank Nat. Tr. Co. v. F.D.I.C.*, 717 F.3d 189, 193 (D.C. Cir. 2013) (citing *Fund for Animals, Inc.*, 322 F.3d at 732) ("Article III requires a showing of injury-in-fact, causation, and redressability").

Under Fed. R. Civ. P. 24(b), the Court may use its discretion to permit a party to intervene only if the party has established (1) timeliness of the motion and (2) a claim or defense that has a common question of law or fact with the existing action. This Circuit has held that "permissive intervention is an inherently discretionary enterprise." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Thus, "[d]istrict courts have the discretion…to deny a motion for permissive intervention even if the movant established [the elements in Fed. R. Civ. P. 24(b) are satisfied]." *Id.* at 1048.

II. Movants Demonstrate No Legally Protected Interest Impaired by this Action

"Prospective intervenors must demonstrate an interest relating to the subject of the action. This prerequisite is satisfied not [by] *any* interest the applicant can put forward, but only [by] a legally protectable one." *Defs. of Wildlife v. Jackson*, 284 F.R.D. 1, 6 (D.D.C. 2012), *aff'd in part, appeal dismissed in part sub nom. Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013) (internal quotation marks and citation omitted). The Halftown Group asserts a broad-based interest in the "benefits" accorded by the challenged decision here. Movants' Points and Authorities in Support of Motion ("Memo") at 6. That decision was, by its terms, limited to the specific ISDEAA contract awarded to proposed intervenors by the Decision of Bruce Maytubby on December 15, 2016 ("BIA Decision"). *See* Complaint., Ex. A. at 1, 14 ("In order to provide [ISDEAA] funding…, I must therefore determine which governing council to recognize for purposes of entering into a contract to provide [ISDEAA-supported] services…Ultimately, all BIA can do is decide whether either of the entities that has submitted a proposal for [an ISDEAA contract] has provided adequate evidence that they represent the Cayuga Nation.").

Upon information and belief, the contested ISDEAA contract funds have already been disbursed to Movants. Plaintiffs do not seek disgorgement of these funds or an order from this Court recognizing Plaintiffs' right to the funds. Compl. ¶¶ 26-27. Plaintiffs seek no relief that would impact the award of these funds, which has already occurred. For this reason, Movants have already received the full slate of "benefits" due to them pursuant to the challenged decision and have no legally protected interest in any additional "benefits."

In particular, Movants have no legally cognizable interest in indirect benefits that might flow from other agencies' or third parties' reliance on the challenged contracting decision. Defendant BIA has no authority to "serve as the arbiter for tribal disputes for the convenience of

other agencies or third parties." *Cayuga Indian Nation v. Eastern Regional Director*, 58 IBIA 171, 182 (2014). The challenged contracting decision has no binding effect on other matters pending before the BIA. *Id*. at 183. A BIA decision is "fatally flawed" when it extends recognition for purposes beyond "conduct of any specified BIA function or program." *Id.* at 179. The funds approved for the specified ISDEAA program decision challenged are not at issue in this litigation, and proposed intervenors cannot ask this Court to protect some inchoate, additional interest in further benefits they claim may flow from the decision. *See Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 541 (D.D.C. 2014) (holding in an analogous context that competing tribal governments' concern for "funds they might receive…[is] not a legal claim to those funds.").

Proposed Intervenors nonetheless rely on *California Valley Miwok Tribe v. Salazar*, 281 F.R.D. 43 (D.D.C. 2012), for the unfounded proposition that they "possess[] a distinct and weighty interest in protecting [the Nation's] governance structure and its entitlement and access to federal grant monies." *California Valley*, 281 F.R.D. at 47. But nothing in Plaintiffs' action threatens either of these purported interests: the action does not seek return of federal grant monies or any relief that would impair the Nation's right to determine its governance structure or manage its internal affairs. Only the Cayuga Nation can determine its governance structure, *In re Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763–64 (8th Cir. 2003), and Plaintiffs' suit merely asks that the Court remove a burden on that right of self-government by vacating the challenged decision and nullifying the United States' effort to impose a "plebiscite" requirement on the Nation.[2]

[2] Vacating the BIA's mandate that a mail-in survey process "must be a valid mechanism" for the Cayuga Nation to choose its governmental leaders would not prevent the Cayuga Nation from adopting any particular form of governance structure in the future.

In any event, *California Valley* is readily distinguishable. In that case, five descendants of a nearly-destroyed tribe sought BIA assistance in creating *ab initio* a tribal government. The BIA and DOI became deeply involved in these individuals' efforts and, following development of a leadership dispute among the five and a series of administrative and federal court decisions, issued a broad-based decision recognizing one tribal faction as "vested with the governmental authority of the Tribe [to] conduct the full range of government-to-government relations with the United States." *See* Miwok Pls.' First Am. Compl. Ex. A at 2, *California Valley Miwok Tribe v. Salazar*, 281 F.R.D. 43 (D.D.C. 2012) (No. 1:11-cv-00160-RWR), ECF No. 32. Plaintiff leadership faction filed suit seeking to prevent the disbursement of contested federal funds and to enjoin the United States from recognizing the proposed intervenors as the tribe's government. *Id*. at 30.

Based on the broad sweep of the recognition decision and the terms of the requested injunction, the *California Valley* court found that if the Plaintiff leadership faction prevailed in its federal suit, "the defendants will be enjoined from awarding any federal funds to [proposed intervenor]." *California Valley*, 281 F.R.D. at 47. No such relief is sought here and no such result would obtain. Plaintiffs do not seek to prevent disbursement of the federal funds that were the subject of the challenged decision – those funds have already been disbursed. Nor do Plaintiffs seek any injunction directing the United States to recognize or not recognize any particular leadership faction. Instead, Plaintiffs seek to remove the burden placed by the challenged decisions on the Cayuga Nation's right of self-government and to restore the *status quo ante.*

Under federal mandates developed and clarified after *California Valley*, BIA recognition decisions are now limited to a specific federal need, in this case the need created by competing ISDEAA contract applications. "When there is a conflict over tribal leadership…the BIA is

precluded from issuing a recognition decision *except* where a federal purpose requires recognition." *Cayuga Nation v. Tanner*, 824 F.3d 321, 329 (2d Cir. 2016) (emphasis in original); *see also Committee to Organize the Cloverdale Rancheria Government v. Acting Pacific Regional Director*, 55 IBIA 220 (2012) (BIA may not address a tribal dispute when there is no separate Federal action required); *Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director*, 54 IBIA 320 (2012) (vacating BIA decision addressing a tribal dispute where BIA failed to identify specific matter requiring BIA intervention in a leadership dispute).

The decision challenged here related to a specific ISDEAA contract application and Plaintiffs do not seek disgorgement of those disbursed contract funds. The decision did not address "the full range of government-to-government relations with the United States." *Cf. California Valley* at 47. Plaintiffs do not seek federal recognition in this action. *Cf. Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, 246 F.R.D. 315, 321 (D.D.C. 2007) (granting intervention where both the plaintiff leadership faction and the proposed intervenor leadership faction "seek [federal tribal] recognition in the current action").

Instead, in reaching the decision challenged here, "all BIA [could] do [was] decide" which faction would be awarded the federal grant, funds for which have already been disbursed. *See* Compl., Ex. A. at 14. *See also* Compl., Ex. B at 28 ("I therefore affirm the Regional Director's decision to award the [ISDEAA] contract to the Halftown Council"). *California Valley* is inapposite.

Nor does *Forest County Potawatomi Community v. United States*, 317 F.R.D. 6 (D.D.C. 2016), support Movants' claim to injury here. That case concerned two Wisconsin Indian tribes, each of which operated a casino pursuant to a compact with the State of Wisconsin. *Potawatomi*, 371 F.R.D. at 9-10. When the Menominee Tribe pursued plans to locate a new casino near

Potawatomi's, Potawatomi sought to amend its compact to create a non-competition zone effectively barring the Menominee venture. The DOI declined to approve Potawatomi's proposed amended compact. *Id*. at 9. Potawatomi filed suit seeking an order compelling DOI to approve the compact amendment and to render it effective as a matter of federal law. *Id*. Menominee moved to intervene, arguing that the requested relief -- DOI approval of the Potawatomi compact -- would have a direct and harmful effort on its right to conduct gaming near Potawatomi's casino, a right expressly protected in its compact with the State. *Id*. at 9-10; 12-13.

This Court noted that Menominee's plans to locate a new casino near Potawatomi's were protected by the state compact and that the relief sought by Potawatomi would impede those plans. Because the requested relief "would put the Menominee at a competitive disadvantage when seeking state approval for off-reservation gaming," the Court found, it constituted an "alteration to competitive conditions" that would "clearly amount . . . to a concrete injury." *Id*. at 12 (internal quotation marks and citations omitted).

Here, by contrast, the sole issue before the agencies below concerned which governmental faction to award an ISDEAA contract. The ISDEAA funds have been awarded to Movants and Plaintiff does not seek their disgorgement or return. The relief Plaintiffs seek does not put Movant at a "competitive disadvantage;" it simply restores a level playing field by preventing the United States and others from relying on the challenged decision beyond its terms or continuing to impose a plebiscite requirement on the Nation. Plaintiffs do not seek to compel the United States to take any action that would advantage one governmental faction over the other. Instead, the relief sought here is intended to restore and preserve the fundamental right of the Cayuga Nation to determine its own government and governmental structures.

Because Movants have failed to show a legally protected interest that would be impaired by this action, they can neither demonstrate Article III standing nor satisfy the requirements of Rule 24(a).[3] The motion should be denied.

III. Any Interest of Movants' is Adequately Represented by the Defendants

Even if this Court finds that Movants have a legally protected interest in this action, that interest is adequately represented by the federal agencies and officials named as Defendants here. In analogous cases, courts in this Circuit have routinely found that the United States can adequately represent tribal interests in challenges to federal agency decisions. *See Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996), *amended* (Aug. 6, 1996) (United States may adequately represent absent tribes in benefit dispute); *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 148 (D.D.C. 1999) (same as to dispute over BIA approval of tribal constitution). That is true even where the requested relief would determine the allocation of resources among various tribes, some of which were nonparties. *Ramah*, 87 F.3d at 1351; *Three Affiliated Tribes of Fort Berthold Indian Reservation v. United States*, 637 F. Supp. 2d 25, 30–31 (D.D.C. 2009) (United States could adequately represent interests of nonparty tribal contractors in suit challenging formula determining allocation of contract funds). There are no funds at issue in this case and the United States can adequately represent any interest Movants have in the challenged decisions.

Movants suggest two rationales for their contention that the United States cannot adequately defend the legality of its agencies' decision-making, neither of which succeeds. First, Movants suggest that this litigation will actually proceed more quickly with the addition of another party Defendant, and that they possess more of an interest in speedy resolution of the suit

[3] Because Movants lack a legally protected interest, they cannot show causation or redressability. *Deutsche Bank*, 717 F.3d at 193. The relief sought here would not cause injury to Movants and Movants' intervention in support of Defendants would not redress any potential injury.

than does the United States. Memo at 9-11. Second, Movants claim that this suit implicates their economic interests, specifically their interest in a business owned by the Nation and operated by Plaintiffs. *Id*. at 10.

Movants profess a particular interest in resolving this litigation *quickly*. Memo at 10 (emphasis in original). Movants' voluminous January 23 filing, totaling more than one hundred pages and asserting positions not taken by Defendants, however, shows that their presence in this litigation would delay, rather than expedite, the litigation. Movants speculate but provide no evidence that the United States lacks an interest in speedy resolution of the claim. Memo at 10 ("Defendants… *may* have no particular interest in when this litigation is resolved.") (emphasis added). They do not explain how the addition of a party will achieve a speedier and more efficient resolution of Plaintiffs' claims or how their presence will hasten United States' litigation of this matter. It stands to reason that additional parties tend to make litigation more complex and less speedy. *See, e.g.*, *Stadin v. Union Elec. Co.*, 309 F.2d 912, 920 (8th Cir. 1962) ("More than one trial court has observed that '[a]dditional parties always take additional time' and that 'they are the source of additional questions, objections, briefs, arguments, motions and the like…'") (internal quotations and citations omitted). In any event, speculation and generalized assertions of inadequacy or differing litigation strategies are insufficient to satisfy Rule 24(a). *Aref v. Holder*, 774 F. Supp. 2d 147, 172 (D.D.C. 2011) (allegations that existing parties may use poor judgment in handling the case does not satisfy the inadequate representation requirement).[4]

[4] Nothing prevents Movants from requesting leave to file an Amicus brief pursuant to Local Rule 7(o)(2) should they identify a specific litigation position not adequately represented by Defendants here.

As to Nation businesses, Movants misstate the facts and the law: Plaintiffs seek no relief from this Court that would upset the status quo in Cayuga Nation territory with regard to operation of businesses.[5] Nor could vacatur of the agency contract decisions challenged here impose any burden or mandate on the Nation as to its self-governance. How Nation businesses are operated and how proceeds are allocated by the Nation are matters resting solely with the Nation and its citizens, and Nation citizens years ago entrusted Plaintiffs with management of the Seneca County convenience store. In any event, Movants have attested that the "vast majority" of their governmental revenue comes from a gambling venture they operate in Cayuga County. *See* Declaration of Clint Halftown ¶¶ 5, 12, *Cayuga Nation v. Tanner*, No. 5:14-cv-1317 (N.D.N.Y. May 29, 2015), ECF No. 5-8, *vacated*, 824 F.3d 321, 329 (2d Cir. 2016). Movants' effort to paint this action as bearing on their economic survival should not be credited. Because any interest of Movants in this action can be adequately represented by Defendants, the motion should be denied.

IV. There Are No Grounds for Permissive Intervention Here

Because Movants have failed to demonstrate standing, this Court need not reach their request for permissive intervention pursuant to Rule 24(b)(1)(B). *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013). Even if the Court finds Movants to have demonstrated standing, permissive intervention should be denied. "Courts have 'wide latitude' in exercising

[5] Movants also claim that a quick resolution of Plaintiffs' suit is necessary in order to allow Cayuga citizens to take unspecified "initiatives" to protect Cayuga Nation property against further forcible takeovers by "a small group of persons associated or aligned with Plaintiffs." Movants' Memo at 10. This argument's factual premise and conclusion are false. Movants lack any basis to allege, much less prove, that Plaintiffs in this action have ever had any role in "violence," "takeovers," civil unrest, or "storm[ing] and taking by force" any Nation property. *See, e.g.*, *Cayuga Nation v. Jacobs*, 986 N.Y.S.2d 791, 794 (N.Y. Sup. Ct. 2014) ("Notably, there is a dearth of allegations regarding any direct involvement by any of the [Plaintiffs here] at any of the [alleged] incidents."). Nor does this action seek a federal court resolution of the Nation's internal leadership dispute.

their discretion to allow or deny permissive intervention." *D.C. v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 236 (D.D.C. 2011) (*quoting Equal Employment Opportunity Commission v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (1998). "In exercising its discretion to allow permissive intervention, the Court must consider whether the proposed intervention 'will unduly delay or prejudice the adjudication of the original parties' rights.'" *D.C. v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 233 (D.D.C. 2011) (quoting Fed.R.Civ.P. 24(b)).

As demonstrated above, Movants' intervention is likely to delay adjudication of the original parties' rights. This case does not concern Cayuga law or which political faction should govern the Cayuga Nation. Participation by a rival leadership faction in this litigation will not help this Court resolve Plaintiffs' claims, which allege violations of federal law by federal agencies and officials. Instead, as evidenced by their Motion and accompanying papers, Movants' intervention threatens to inject in to this Administrative Procedures Act suit a raft of distractions related to internal Cayuga Nation politics. "Jurisdiction to resolve internal tribal disputes… lies with Indian tribes and not in the district courts." *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003), *citing United States v. Wheeler*, 435 U.S. 313 (1978). The Motion should be denied.

V. Any Grant of Intervention Should Be Conditioned

If this Court grants the motion to intervene, it should do so conditionally. Conditions such as those imposed on Defendant-Intervenor in *Potawatomi* would be appropriate here to ensure intervention does not unduly delay or complicate litigation. Such conditions included requirements that:

- The intervening parties shall meet and confer prior to the filing of any motion, responsive filing, or brief to determine whether their positions may be set forth in a consolidated fashion—separate filings by the intervening parties shall include a

certificate of compliance with this requirement and briefly describe the need for separate filings;

- The intervening parties shall confine their arguments to the existing claims in this action and shall not interject new claims or stray into collateral issues;

- The intervening parties shall comply with each of the directives set forth in the Order Establishing Procedures for Cases Assigned to Judge Colleen Kollar-Kotelly[];

- In the event that a motion for summary judgment is filed in this action, the intervening parties shall file a joint statement of facts with references to the administrative record consistent with Local Rule LCvR 7(h)(2)—to the extent the intervening parties cannot agree on the inclusion of particular facts in their joint statement, they may identify such additional facts in bullet-point format in their respective memoranda of points and authorities.

Potawatomi, 317 F.R.D. at 15–16 (D.D.C. 2016).

CONCLUSION

Movants have failed to demonstrate a legally protected interest threatened by this litigation or to show that Defendant federal officials and agencies cannot adequately represent their interest in adjudication of Plaintiffs' claims under the Administrative Procedures Act. Intervention is likely to delay the litigation and inject collateral issues not raised by Plaintiffs' claims. For all the foregoing reasons, the Motion to Intervene should be denied.

Date: February 6, 2018

Respectfully submitted,

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